Supreme Court, U.S.
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No. 95-629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOHN M. HEGARTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,
Petitioner,

v.

SOMERSET COUNTY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION TO ARGUMENT

Respondents (defendants) raise three points in their Briefs in Opposition to the Petition for Certiorari (Ptn.). They argue that petitioner (plaintiff) has "distorted" the record in order to assert that there are disputed issues of material fact which should not have been resolved by the First Circuit. They also argue that there are no disputed issues of material fact and that both the District Court and the First Circuit applied legal rules to an undisputed record, the District Court erroneously and the First Circuit correctly and that *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) does not apply to this case because it does not present any factual issues.

ARGUMENT IN REPLY

I. THE JOHNSON RULE MUST BE APPLIED TO THIS CASE.

Plaintiff has argued that his Petition for Certiorari should be granted because the First Circuit Court of Appeals failed to apply the rule against immediate appeals promulgated in *Johnson v. Jones* to this case. Defendants respond that *Johnson* does not apply because this case presents no disputed issues of material fact. Plaintiff has already shown in the Petition that there are genuine and material issues of fact which are disputed in this case. *See* Ptn. at 16-25. These issues are not different from the fact issues presented in *Johnson*. Whether these defendants had enough reliable information about Katherine Hegarty's emotional state to use it as a factor in deciding to forcibly enter her cabin minutes after they arrived there and shoot her to death is a fact question in the same way as whether the defendants in

Johnson did or did not beat the plaintiff or did or did not stand by while he was being beaten. *See* Sec. III, *infra*.

In *Johnson*, this court held that such issues could not be immediately appealed in qualified immunity cases because they were issues of fact. *See Johnson*, 115 S. Ct. at 2165. In *Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995) the First Circuit explicated *Johnson's* holding as follows:

> The bottom line, then, is simply this: a summary judgment order which determines that the pretrial record sets forth a genuine issue of fact, as distinguished from an order that determines whether certain given facts demonstrate, under clearly established law, a violation of some federally protected right, is not reviewable on demand.

Because *Johnson* is retroactive, *id.*, it applies to this case, which was pending before the Court of Appeals when *Johnson* was decided. Because the record contains disputed issues of material fact, the First Circuit should have dismissed the defendants' appeal and remanded the case to the District Court for further proceedings. It erred in failing to do so and that error so seriously affected the plaintiff's rights that this Court should reverse it.

II. PLAINTIFF HAS NOT DISTORTED THE RECORD.

All the defendants allege that plaintiff has misrepresented the record by characterizing as fact assertions which are not supported by the record. A review of some of the specific examples given by Defendant Wright

demonstrates that plaintiff's characterization of the record is more accurate than defendants'. For example, Wright asserts at page10, footnote 7 of his brief [Wright Br.] that "[t]he Petitioner's assertion that Hegarty acknowledged to the officers that men had been around but that she could not describe them is without record support." At page 1152 of the Joint Appendix (J.A.), Trooper Wright says, in a statement made to the Attorney General's investigator, that Mrs. Hegarty said to the officers, "'Yeah, I know there were guys around, but they're not around any more,' or something to that effect." Wright goes on to say that "We, we asked her if she could describe them to us . . . and she said, 'No, I didn't see them that close,' or something like that, 'But they're gone now,' or words to that effect." *Id.* This is clear record support for the fact that Mrs. Hegarty had indeed told the officers that she had seen the men they were allegedly looking for.

The record also supports plaintiff's statement that Mrs. Hegarty had come into the front room of the cabin unarmed. *See* Wright Br. at 9 n. 8 (". . . no evidence exists that Hegarty walked into the front room unarmed."). In his deposition , Deputy Crawford stated that, when he looked into the front room from behind Mrs. Hegarty, he could not see the gun which she had had in the bedroom. J.A. 148. At that time, he could not see a gun either in her hands or "anywhere in her immediate vicinity." *Id.*

Finally, defendant Wright argues that there was no record support (or citation) for plaintiff's statement that "no officer believed she posed any immediate danger", Ptn. at 7, when she was kneeling by the front window. Wright Br. at 11 n. 10. This is also an inaccurate characterization of plaintiff's statement, which is also supported by the record

citations at the end of that paragraph. In his deposition, Deputy Giroux specifically testified that, at that time, Katherine Hegarty did not pose a threat of immediate danger either to him or to any of the other officers. J.A. 95. Officer Guay responded similarly. J.A. 257.

Plaintiff believes that while these are minor factual points, they give the lie to the defendants' assertions that various facts cited in the Petition are not supported in the record. Defendants' argument on this point is evidently intended to buttress its main contention: that, as to material facts, the record is undisputed and that it was not therefore error for the Court of Appeals to decide the case as a matter of law. The existence of record support for plaintiff's version of the events in question supports plaintiff's position that there are unresolved issues of fact as to critical questions such as the nature of Mrs. Hegarty's emotional state on the night she died and the officers' knowledge of it, how important it was for the officers to locate her, and whether it was necessary for the officers to forcibly enter her cabin so soon after locating her. *See* Petition at 19-27.

Plaintiff is confident that review of the entire record will show that, if any parties have distorted the record, it is the defendants, whose stubborn insistence that the critical facts are undisputed goes well beyond what even a zealous advocate may argue.

III. THERE ARE DISPUTED ISSUES OF MATERIAL FACT WHICH SHOULD NOT HAVE BEEN DETERMINED ON SUMMARY JUDGMENT.

Defendants' main argument is that this Court should not review this case because its material facts are undisputed, and the Court of Appeals properly found for defendants as a matter of law. Defendants further argue that both lower courts recognized that the facts were undisputed but that the District Court erred in applying the law to the facts.

These arguments mischaracterize the District Court's analysis and proceed from an overly narrow view of what constitutes a material issue of fact.

Defendants' argument incorrectly analyzes the District Court's opinion. In that opinion, the court resolved all disputed issues of fact in plaintiff's favor, as required by summary judgment practice, and concluded that the defendants' motions for summary judgment must be denied because they were not entitled to judgment as a matter of law. *Hegarty v. Somerset County*, 848 F. Supp. 257, 264 (D. Me. 1994); Appendix (App.) to Ptn. at 43a. This is not the same as entering summary judgment *for* plaintiff on these issues, and resolving disputed fact issues in plaintiff's favor for the limited purpose of deciding a motion for summary judgment is not the same as resolving them as a factfinder. Accurate characterization of the District Court's opinion demonstrates that at least that court correctly viewed this as a case involving unresolved and disputed issues of fact.

The fact that the District Court did not resolve the disputed factual issues also establishes that the Court of Appeals erred in reviewing the District Court's judgment by

reviewing the record and resolving the factual disputes rather than construing the record "in the light most hospitable to the party opposing summary judgment, including all reasonable inferences in that party's favor." *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990). This is precisely the type of error which this Court sought to remedy in promulgating the *Johnson* rule. This Court recognized in *Johnson* that the Courts of Appeals should not become factfinders in qualified immunity cases because they do not have the expertise nor are summary judgment records sufficiently developed for such factual review. *Johnson*, 115 S. Ct. at 2157.

The second major flaw in the defendants' argument that there are no material facts in dispute is that it is simply inaccurate under a proper definition of disputed material fact.

In his Petition for Reconsideration to the First Circuit and his Petition for Certiorari to this Court, plaintiff has argued that the First Circuit improperly resolved disputed issues of fact regarding Mrs. Hegarty's emotional state on the night she was killed. Plaintiff believes that this issue presents a genuine fact dispute because plaintiff presented expert evidence that, even assuming that Mrs. Hegarty was emotionally or psychologically overwrought that night, the officers still acted unreasonably. J.A. 377, 384-85.

While the District Court gave almost no weight to the officers' "concerns about [Mrs.] Hegarty's mental and emotional condition," *see Hegarty*, 848 F. Supp. at 262 n. 4; App. to Ptn. at 37a, the defendants in their briefs in opposition strenuously argue that the forcible entry and shooting were justified at least in part by their fear about her emotional condition and alleged history of aggressive behavior. *See* Wright Br. at 6-7, 23-24; Resp. Br. at 18-20.

They argue that their knowledge of her emotional history and condition is undisputed and that the First Circuit was therefore justified in using it to buttress its conclusion that the officers were immune.

This analysis oversimplifies the concept of a disputed issue of material fact in a qualified immunity case by reducing it to a yes-or-no proposition: either the officers had knowledge of Mrs. Hegarty's emotional sate or they did not; either she had had previous problems or she had not.

This problem arises because the issues of Mrs. Hegarty's mental state and the officers' knowledge of it are not capable of numerical or other exactitude. The question in this case is not simply *whether or not* Kathy Hegarty was emotionally unstable on the night of her death, but rather, if she was, how unstable she was, how much the officers knew about her condition, whether what they thought they knew was accurate, and how that information would be factored into a reasonable officer's analysis of probable cause and exigent circumstances.

The inquiry in a qualified immunity case is whether a reasonable officer with the same information as defendants would do what the officers did. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 3040, 97 L. Ed. 2d 523 (1987). That analysis cannot be made based on the simple question whether Mrs. Hegarty was emotionally overwrought or psychologically unstable on that night.

Where knowledge of different mental states would lead a reasonable officer to do different things, if there is evidence in the record that Mrs. Hegarty could have been more or less upset or unstable, her mental condition is a material and

disputed issue of fact which cannot be resolved on summary judgment, even if, as defendants maintain, there is a range of acceptable and therefore immune conduct. If a jury could find, for example, as it could here, that Mrs. Hegarty was simply upset that night because of the trespassing campers,[1] it is unlikely that an objectively reasonable officer would be justified in forcibly entering her cabin and shooting her to death only minutes after getting there with so little effort to get her to come out peacefully.

This precise distinction was recognized by the First Circuit in *Prokey v. Watkins*, 942 F.2d 67, 75 (1st Cir. 1991):

> Whether, here, a reasonable policeman, on the basis of the information known to him, could have believed there was probable cause is a question of law, subject to resolution by the judge not the jury. *See Hall v. Ochs*, 817 F.2d 920, 924 (1st Cir.1987). Nevertheless, *if what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder. See Vacca v. Barletta*, 933 F.2d 31, 34-35 (1st Cir. 1991); *Rakovich v. Wade*, 850 F.2d 1180, 1202 (7th Cir.), *cert. denied*, 488

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[1]Contrary to defendants' assertion, there is evidence in the record to support a finding that the campers had trespassed on the Hegartys' property in order to get to their campsite (which itself may have been on the Hegartys' land). *See* J.A. 884-85. Moreover, defendants concede that Mrs. Hegarty was upset in part because she thought the campers were trespassing. *See* Resp. Br. at 2.

U.S.968, 109 S. Ct. 497, 102 L. Ed. 2d 534 (1988).

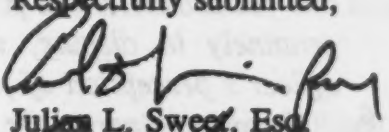
[Emphasis added].

Under this analysis, even if it is accepted *arguendo* that Mrs. Hegarty had prior psychological problems or a history of aggressive behavior about which some or all of the defendants knew, the nature and extent of her mental state and the officers' knowledge of that state are disputed questions of fact.

CONCLUSION

For the reasons set out herein and in the Petition for Certiorari, this Court should grant the Petition and should remand this case to the First Circuit Court of Appeals for reconsideration in light of *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995).

Respectfully submitted,



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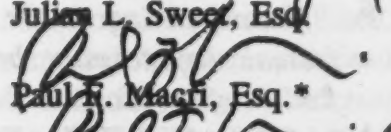

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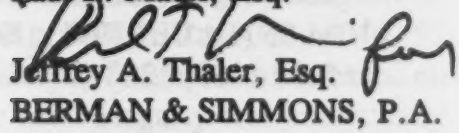

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